Significant International Environmental Law Cases 2016-17

Significant International Environmental Law Cases: 2016-17

James Harrison*

1. Introduction

This review of significant international environmental cases covers the period from May 2016 to May 2017. It focuses on those cases in which courts and tribunals have made a significant contribution to the development of international environmental law by interpreting relevant treaties or making pronouncements on the content of customary international law in the field of environmental protection. The consensual nature of international litigation means that such cases are infrequent. This year, for the first time in a number of years, there were no judgments by the International Court of Justice or the International Tribunal for the Law of the Sea on environmental matters, although some disputes are pending.[1] The cases that have been decided in the past twelve months rather stem from specialist courts and tribunals, which are granted compulsory jurisdiction over dispute under particular treaties. Whilst the treaties being applied in these cases are primarily concerned with the promotion of other social (human rights) or economic (trade and investment) values, the judgments, decisions or awards demonstrate that these instruments can be interpreted in a way to improve or impede environmental protection. Therefore environmental lawyers need to pay close attention to developments in these fields, as they will influence the extent to which states may (or must) take measures to protect the environment.

2. Investment Protection and the Environment

International investment law continues to raise disputes involving challenges to state measures that are alleged to have caused harm to foreign investors in violation of international rules on the protection of foreign investment.
The case of *Windstream Energy v Canada*[2] is one of the more interesting investment disputes in recent years concerning environmental issues because it directly raises the question of whether a state can rely upon the precautionary approach/principle as a means for justifying interference with foreign investment projects. Windstream Energy was an American company, which established a special purpose vehicle incorporated in Ontario in order to carry

* Senior Lecturer in International Law, University of Edinburgh School of Law. Email: james.harrison@ed.ac.uk.

[1] See eg *Dispute over the Status and Use of the Waters of the Silala (Chile v Bolivia)*, pending before the International Court of Justice, in which Chile alleges, inter alia, that Bolivia has failed to conduct environmental impact assessment of certain activities which could have transboundary effects on the Silala River; see the Chilean Application instituting Proceedings (6 June 2016).

[2] *Windstream Energy v Canada*, UNCITRAL Arbitration, Award of the Tribunal (27 September 2016).

out an offshore wind energy project. The project proposal was made in response to an announcement by the provincial authorities, highlighting opportunities for investments in renewable energy. Windstream Energy applied for a Feed-In Tariff (FIT) contract for, *inter alia*, the Wolfe Island Shoals project, an offshore wind facility consisting of approximately 100 wind turbines in Lake Ontario capable of generating 300 MW of electricity. Windstream Energy's application was approved in May 2010 and the contract was signed in August 2010. The FIT provided a 20-year fixed price to be paid by the Ontario Power Authority for energy from renewable sources. The company provided a letter of credit of 6 million Canadian dollars to support its contract. According to the contract, Windstream Energy was required to bring its facility into commercial operation by 4 May 2015. Unfortunately, the project would run into difficulties due to certain additional obstacles required by the regulatory process and it is these problems that subsequently led to Windstream Energy commencing arbitral proceedings under Chapter 11 of the North American Free Trade Agreement (NAFTA).

As well as obtaining a FIT contract, Windstream Energy also had to obtain, *inter alia*, a Renewable Energy Approval (REA), which would be granted subject to the project meeting certain requirements imposed by domestic regulations. At the time when Windstream Energy entered into its FIT contract, the domestic regulations relating to offshore wind had not yet been adopted. Work on developing these regulations took place over the summer of 2010, when several technical workshops were held. It was at this time that a public consultation on offshore wind also took place, revealing significant opposition to such projects due to environmental concerns. In October 2010, the Ministry of Natural Resources informed Windstream Energy that the government's offshore wind policy was 'still outstanding' and the project would not be able to advance until further progress had been made. Two months later, Windstream Energy invoked the force majeure clause of its FIT contract as a means of suspending the contract until the domestic regulatory framework had been completed and it was able to proceed with the project. In February 2011, the government of Ontario announced that it would not be moving forward with offshore wind until further scientific evidence concerning the environmental impact of offshore turbines could be gathered. According to officials from the Ministry of the Environment, they did not have enough information to draft a REA regulation for offshore wind and there was 'too much uncertainty for us to go forward on that now…'[3] Following this announcement, Windstream Energy entered into negotiations about what to do about their FIT contract, but no settlement was reached.

When Windstream Energy brought its claim under the investment protection provisions of the NAFTA in December 2012, the FIT contract was still in force, but there was still no move by the government of Ontario to put into place the regulations that would allow Windstream Energy to commence its project at Wolfe Island Shoals. Thus, in its pleadings, Windstream Energy argued that the actions of the provincial government constituted a breach of Canada's

[3] [146].

obligations under NAFTA, including, *inter alia*, a breach of Article 1110 on expropriation and Article 1105 on fair and equitable treatment. In its defence, Canada argued that 'the decision to defer offshore wind projects was grounded in the precautionary principle'[4] and it denied that there had been any violation of its international obligations. The award on the merits of the dispute was handed down by an arbitral tribunal in September 2016.

On the question of expropriation, the Tribunal followed the established jurisprudence by saying that it was first necessary to determine whether the investor has been substantially deprived of the value of its investment. The Tribunal noted that, on the facts, the claimant still had its FIT contract and therefore, at most, the claimant had been deprived of the opportunity to develop the project. Moreover, the security offered by the claimant was still in place and it had not been taken by the provincial authorities. In light of this continuing contractual relationship, the Tribunal emphasised that it was open to the parties to re-negotiate the FIT contract to take into account the moratorium introduced by Ontario. At the same time, under the FIT contract, if the date for commercial operation was delayed by 24 months by reason of force majeure, the claimant would have the right to unilaterally terminate the contract and the security would be returned. In these circumstances, the Tribunal held that no expropriation of the investment could be considered to have taken place.[5]

The question of fair and equitable treatment is far more controversial and it has raised significant disagreements in the case law to date as to how the standard should be interpreted.[6] The Tribunal noted this divergence of opinion in its award and it also acknowledged the difficulties in determining this issue. In this respect, the Tribunal held that:

> [I]n principle, the content of a rule of customary international law such as the minimum standard of treatment can best be determined based upon evidence of actual State practice established custom that also shows that the States have accepted such practice as law (opinio juris). However, the Tribunal notes that neither Party has produced such evidence in this arbitration. In the circumstances, the Tribunal must rely on other, indirect, evidence in order to ascertain the content of the customary minimum standard of treatment … Such indirect evidence includes, in the Tribunal's view, decisions taken by other NAFTA tribunals that specifically address the issue of interpretation and application under Article 1105(1) of NAFTA, as well as relevant legal scholarship.[7]

In practice, the Tribunal relied upon the previous jurisprudence in order to justify its position that 'just as the proof of the pudding is in the eating (and not in its description), the ultimate test of correctness of an interpretation is not in

---

[4] [206].
[5] [290].
[6] See eg summary and discussion of *Bilcon v Canada*, in James Harrison, 'Significant International Environmental Law Cases: 2014-15' (2015) 27 JEL 549-553.
[7] [351]

its description in other words, but in its application to the facts.'[8] By adopting this approach, the Tribunal avoided taking any view on whether or not the protection of legitimate expectations is inherent in the requirement of fair and equitable treatment. Nor did the Tribunal say much at all about the precise threshold of a violation. Indeed, it is not apparent that the Tribunal gave any more specific content to the standard than determining whether or not the conduct of the provincial authorities could be considered as 'fair' and 'equitable.' Nevertheless, the actual application of the standard to the facts does reveal some interesting points about the limits of governmental authority on environmental issues and how far the precautionary approach/principle may be used to justify interference with foreign investors.

In the first place, the Tribunal accepted that the government's evolving policy was 'at least in part driven by a genuine policy concern that there was not sufficient scientific support for establishing an appropriate setback, or exclusion zone, for offshore wind projects.'[9] Furthermore, the Tribunal accepted that whilst there had been public opposition to the development of offshore wind, this had not been the predominant reason for the moratorium.[10] This would seem to support the notion that the precautionary approach/principle is a justifiable defence for governmental action that interferes with foreign investments. However, it is important to note that the Tribunal goes on to say that the action by Ontario following the announcement of the moratorium did amount to a breach of the fair and equitable treatment standard because 'the Government on the whole did relatively little to address the scientific uncertainty surrounding offshore wind that it had relied upon as the main publicly cited reason for the moratorium.'[11] This finding would seem to suggest that the precautionary approach/principle would support temporary interference with investments, but that states have an obligation to take some action to fill the gaps in scientific certainty. The Award does not tell us much about how much states must do in this context, as the Tribunal simply noted that many of the research plans announced by Ontario were not carried out and there had been no further development of the regulatory framework.

Another major factor in the finding of the Tribunal was the failure of the authorities to address the contractual limbo in which Windstream Energy found itself after the imposition of the moratorium. On this basis, Canada was held to be in violation of Article 1105 and Windstream Energy was awarded 25,182,900 Canadian dollars in compensation.

Most investment disputes with an environmental element, such as the one considered above, are concerned with challenges to environmental rules adopted by the host state in a manner that has negatively affected a foreign

[8] [362].
[9] [376].
[10] [377]. This finding therefore distinguishes the case from previous cases where states have claimed to have scientific concerns for cancelling licences but have been found to have been acting in order to assuage public concerns; see eg *Tecnicas Medioambientales Tecmed SA v Mexico*, ICSID Case No. ARB(A)/00/2, Award of the Tribunal (29 May 2003), [164].
[11] [378].

investor. *Allard v Barbados*[12] is unusual insofar as the investor was claiming that the failure of the host state to enforce its environmental rules and to ensure the protection of a wetland area on and adjacent to his property had undermined his investment in an eco-tourism attraction. The investor, Mr Allard, was a Canadian citizen, who had established the Graeme Hall Bird Sanctuary Inc in 1996, following which he purchased 34.25 acres of land in the Graeme Hall Swamp on the south coast of Barbados. The land included a forest of red and white mangroves, as well as a lake and ponds, which were connected to the ocean by a canal. The connection between the canal and the ocean was regulated by a sluice gate operated by the government. Mr Allard claimed that the government's failure to operate the sluice gate in accordance with agreed procedures, as well as other alleged failures to enforce environmental laws, led to the gradual deterioration of the environmental quality of his land, forcing him to cease all operations at the sanctuary in March 2009, with the exception of the running of a roadside café. In May 2010, Mr Allard brought claims under the 1996 Canada-Barbados Agreement for the Reciprocal Promotion and Protection of Investments, alleging a violation of Article II(2)(a) on fair and equitable treatment, Article II(2)(b) on full protection and security, and Article VIII on expropriation. All claims by the investor ultimately failed and he was ordered to pay 2.5 million US dollars in costs to the Barbadian government. Nevertheless, the arbitral award offers some interesting observations about the use of evidence in environmental related claims, as well as the scope of the fair and equitable treatment standard and the full protection and security standard in the context of environmental protection.

The main reason for the investor losing his suit was the failure to demonstrate that there had been any environmental degradation caused by the government of Barbados during the relevant period. Both sides had presented conflicting evidence on this point and therefore how the Tribunal reached its conclusion is itself of interest. According to the Tribunal, 'to establish loss the [c]laimant first must establish that there was a degradation of the environment at the Sanctuary sufficient to render operating the [s]anctuary as an ecotourism attraction impossible or financially unsustainable.'[13] The Tribunal emphasised that this was 'an objective enquiry'[14] and that the burden of proof was on the [c]laimant to demonstrate that such a degradation had occurred.[15]

Moreover, it was necessary to prove that such degradation had happened between the initial establishment of the sanctuary in 1996 and the closure of the enterprise in 2009. Both sides had presented environmental experts, who put forward different hypotheses as to the environmental state of the wetland and the causes of any degradation. In addition, the Tribunal took into account a number of other sources presented by the parties, including an undergraduate marine biology thesis, a study carried out by scientists at McGill University, and a water monitoring programme carried out by the University of the West Indies. In construing this information, the Tribunal was careful to ensure that it was

[12] *Peter A Allard v Barbados*, UNCITRAL Arbitration, Award of the Tribunal (27 June 2016).
[13] [84].
[14] [84].
[15] eg [110].

making valid comparisons between data collected at similar times of year and according to equivalent methodologies. This was particularly important given that it was accepted by both parties to the litigation that there were seasonal variations in water quality, which was one of the main indicators employed by the Tribunal to determine whether there had been degradation of the aquatic environment. Overall, the Tribunal was not convinced by the evidence that had been presented and it held that 'the [c]laimant falls short of establishing material deterioration during the [r]elevant [p]eriod, let alone to the extent that would be apparent to one-time visitors.'[16] The Tribunal went on to say that even if it assumed that there was evidence of decline in environmental quality, such events could not be attributed to the actions of the government of Barbados. The main issue here was whether the government had mismanaged the sluice gate that connected the lake in the sanctuary with the ocean. It was accepted that this sluice gate had been un-operational for a prolonged period of time and the investor had claimed that this state of affairs had caused the alleged reduced salinity of the swamp. However, the Tribunal also agreed that the sluice gate had often been used to drain excess water from the swamp, rather than to ensure water exchange between the swamp and the sea. Moreover, the Tribunal also accepted that the sluice gate was not necessarily the only means through which salty water could enter the swamp, as this could also occur through subsurface water exchange. Thus, the claimant failed to prove the necessary causal link.

Despite finding that there was no evidence of environmental degradation, the Tribunal nevertheless went on to consider the legal arguments presented by the parties and whether the claims advanced by the investor were valid in principle. The Tribunal dismissed the expropriation claims with little hesitation, noting the investor still operated a roadside café on his land and therefore it could not be claimed that he had been substantially deprived of his business. For present purposes, the Tribunal's comments in relation to the fair and equitable treatment standard and the full protection and security standard are worthy of greater attention.

In *Allard*, the Tribunal took the view that the fair and equitable treatment standard included a duty to protect the legitimate expectations of an investor, whether or not the standard was construed as an autonomous treaty standard or a reflection of the international minimum standard.[17] Nevertheless, it was necessary for the claimant to demonstrate that such expectations had arisen in practice. The claimant had argued that he had legitimate expectations that the government would take measures to protect the swamp where his sanctuary was located. Such expectations were based upon the 1986 Development Plan adopted by Barbados for the relevant area, as well as correspondence and statements from the government. Mr Allard also claimed that his expectations were confirmed and reinforced by Barbados' environmental treaty obligations under the Convention on Biological Diversity[18] and the Ramsar Convention on

[16] [139].
[17] [193].
[18] Convention on Biological Diversity, adopted 22 June 1992, entered into force 29 December 1993, United Nations Treaty Series, vol. 1760, p. 9.

Wetlands of International Importance.[19] The Tribunal considered each of these arguments in turn. In terms of the 1986 Development Plan, the Tribunal suggested that this document could not readily generate legitimate expectations, noting that 'as a matter of general approach, such planning regulations of an administrative nature are not shielded from subsequent changes under domestic law.'[20] The environmental management plan developed by the investor, but approved by the government as part of the planning process, could also not be considered to amount to anything more than entitling the investor to expect that he could proceed with the project without objection from the government on environmental grounds and the inclusion of provisions on the operation of the sluice gate in the management plan did not constitute a representation by which the state could be bound. Nor did any of the correspondence relied upon by the investor point to an express commitment that the 1986 Plan would not be amended. Similarly, assurances given by the former Deputy Prime Minister at a meeting with the investor in November 1996 were 'insufficiently specific to give rise to legitimate expectations.'[21] Indeed, even if representations had been made that were capable of generating legitimate expectations, the Tribunal held that there was no evidence that the investor had relied upon them in his decision to make the investment, which came before any of the alleged representations were made. Given these negative findings, the Tribunal did not consider it necessary to deal with the argument that Barbados' treaty obligations confirmed the legitimacy of the investor's expectations.

Claims based upon the full protection and security standard are less common and therefore it is significant that the Tribunal appears to suggest that failure to take steps to protect the environment could in principle amount to a violation of this standard. At the same time, the Tribunal emphasised that the obligation is 'not one of strict liability but of "due diligence" or "reasonable case"'[22] and 'a host State is not required to take any specific steps that an investor asks of it.'[23] In another interesting comment on the content of this standard, the Tribunal suggested that 'consideration of a host State's international obligations may well be relevant in the application of the standard to particular circumstances.'[24] This is a welcome recognition of the need for a mutually supportive interpretation of investment treaties and multilateral environmental agreements, although the full ramifications of this statement are not clear as the Tribunal determined that there was no breach of the due diligence standard and it did not consider it necessary to look at any specific environmental treaty obligations in reaching its conclusions. Nevertheless, the award leaves the door open for this argument to be raised again in the future, if an investor brings a similar claim.

---

[19] Convention on Wetlands of International Importance, adopted on 2 February 1971, entered into force on 21 December 1975, United Nations Treaty Series, vol. 996, p. 246.
[20] [200].
[21] [204].
[22] [243].
[23] [244].
[24] [244].

3. Trade and the Environment

The case of *India – Certain Measures relating to Solar Cells and Solar Modules*[25] is the latest challenge to domestic measures for the promotion of renewable energy generation under the rules of the World Trade Organization (WTO). India had launched the Jawaharlal Nehru National Solar Mission in 2010 with a view to establishing India as a global leader in solar energy 'by creating the policy conditions for its diffusion across the country as quickly as possible.'[26] The scheme involved the granting of power purchase agreements, under which the government committed to purchasing power produced through solar energy at a guaranteed rate for a 25-year term. The agreements, however, included a domestic content requirement clause. The precise substance of the clause differed depending on the nature of the technology being used to generate electricity, but they all essentially made it compulsory for some form of component manufactured in India to be used in the generating system. It was this element of the scheme that was challenged by the United States (US) as a violation of Article III of the General Agreement on Tariffs and Trade (GATT) because it discriminated against foreign products. The US also claimed that the measure breached the Agreement on Trade Related Investment Measures. The complaints were upheld by a WTO panel in February 2016, but the result was appealed by India. The WTO Appellate Body handed down its decision in September 2016, confirming the finding of the original panel, whilst offering some interesting observations on the legal arguments raised in the case.

In many respects, the dispute resembles a previous claim against a Canadian scheme to promote renewable energy involving domestic content requirements.[27] Indeed, despite claims by India that the dispute could be distinguished and a different test should be applied, both the panel and the Appellate Body confirmed the applicability of the analysis of Article III that had been employed in that previous case. On this basis, India was found to have adopted measures that discriminated in favour of domestic products and it was unable to satisfy the exception for laws, regulations or requirements governing the procurement of products by governmental agencies. Whilst this part of the decision is relatively straightforward, other parts of the decision are of greater interest because of their consideration of two further exceptions to Article III.

Firstly, the Appellate Body considered whether the measures could be justified under Article XX(j) of the GATT, which permits measures 'essential to the acquisition or distribution of products in general or local short supply…' The case is significant because it is the first time that this provision has been interpreted by the Appellate Body.[28]

---

[25] WTO Appellate Body, *India – Certain Measures relating to Solar Cells and Solar Modules*, Document WT/DS456/AB/R (16 September 2016).
[26] [1.3].
[27] See summary and comment in James Harrison, 'Significant International Environmental Law Cases: 2012-14' (2014) 26 JEL *519-540.*
[28] [5.58].

India had argued that this exception would allow measures aimed at minimizing 'risks inherent to the continue dependence on imported solar cells and modules' and to 'ensure domestic resilience in addressing any supply side disruptions' with a view to ultimately promoting energy security and sustainable development.[29] Yet, the Appellate Body upheld the panel's decision to reject this defence, in large part because India had failed to identify any actual disruptions in supply.[30] Furthermore, the Appellate Body confirmed that, even assuming that there was a risk of disruption, it did not 'follow from an increase in domestic production capacity that domestic manufacturers will necessarily sell their production to domestic buyers, rather than exporting to buyers abroad.'[31] Whilst the Appellate Body expressed sympathy with the policy objectives of the Indian government to promote energy security and ecologically sustainable growth, it underlined that such policy considerations 'do not relieve the responding party invoking the exception in Article XX(j) from the burden to demonstrate that imported products are not "available" to meet demand and that the products at issue are "in general or local short supply."'[32] In light of this finding, it was not necessary for the Appellate Body to determine whether the measure was 'essential' for the purposes of Article XX(j), although it did indicate that this requirement set a high threshold and it was 'as least as' stringent as the necessity requirement under paragraphs (a), (b) and (d) of Article XX.[33]

India had also invoked the exception in Article XX(d) of the GATT, which permits measures 'necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies …, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices.' In developing its argument under this provision, India had made reference to a number of instruments, which it claimed justified the adoption of its measures, with a particular focus on the Electricity Act read in conjunction with the National Energy Policy, the National Electricity Plan, and the National Action Plan on Climate Change. According to India, these instruments laid down a requirement of ecologically sustainable growth. Whilst the Appellate Body agreed that it was possible to look at these instruments collectively as part of a comprehensive framework,[34] it emphasized that it was still necessary for India to demonstrate that they contained rules that were normative in nature.[35] The Appellate Body reviewed the different instruments relied upon by India, but it did not consider that they set out a 'rule' to ensure ecologically sustainable growth.[36] Rather, the Appellate Body confirmed the finding of the panel that 'the

[29] [5.75]-[5.76]
[30] [5.76].
[31] [5.74].
[32] [5.79].
[33] [5.62].
[34] [5.111].
[35] [5.109]. See also [5.111]: 'insofar as a respondent seeks to rely on a rule deriving from several instruments or parts thereof, it would still bear the burden of establishing that the instruments or the parts that it identifies actually set out the alleged rules.'
[36] [5.133].

text of these passages and provisions is "hortatory, aspirational, declaratory, and at times solely descriptive."'[37]

India also claimed that its measures were further supported by its international obligations, which were capable of being implemented at the national level through executive action and therefore should be considered as relevant 'laws or regulations' for the purposes of Article XX(d). However, the Appellate Body did not consider that India had sufficiently demonstrated that any of the international instruments relied upon by India, such as the United Nations Framework Convention on Climate Change[38], the Convention on Biological Diversity or Agenda 21, were 'rules that form part of its domestic legal system and fall within the scope of "laws or regulations" under Article XX(d).'[39] This finding relied upon the understanding of the Indian legal system as dualist in nature so that these international instruments did not have direct effect in Indian law without some implementing act by the legislative or executive branch of government. Thus, India's defence was rejected and the panel report was upheld.

4. Human Rights and the Environment

Human rights courts and tribunals are also commonly called upon to take into account environmental considerations in their case law and 2016-17 saw a number of new decisions in this regard. The applicant in *SC Fiercolect Impex SRL v Romania*[40] ran a scrap iron collection and recycling facility in the Cluj Prefecture of Romania. The facility had an operating permit, which was valid until 7 March 2005. According to the applicable regulations, it was necessary to apply for an extension to the permit by 4 January 2005. Regulations also required an application for an environmental permit to be submitted alongside the application for the operating permit. When the applicant applied for the environmental permit, he was informed that it could not be processed because guidelines relating to the issuing of environmental permits had not yet been adopted. As a result, the applicant was not able to obtain either the environmental permit or the operating permit for a few months until the guidance was issued. It followed that the facility was operating without the necessary permits and the applicant was fined 25,000,000 Romanian Leu and he had a further 768,471,700 Romanian Leu confiscated to represent the market value of the scrap metal that had been collected for recycling during the period in which the facility had been operating illegally. The applicant brought proceedings before the European Court of Human Rights, alleging a violation of Article 1 of Protocol 1, which protects the right to property. The essential argument advanced by the applicant was that the failure to obtain a permit

[37] ibid. See also [5.136]

[38] United Nations Framework Convention on Climate Change, adopted 9 May 1992, entered into force 21 March 1994, United Nations Treaty Series, vol. 1771, p. 165.

[39] [5.148].

[40] *SC Fiercolect Impex SRL v Romania,* European Court of Human Rights (ECHR), Former Third Section, App no 26429/07 (13 December 2016).

within time was due to the delays caused by the government and therefore he should not be held responsible.

The Court noted that Article 1 of Protocol 1 requires a 'fair balance' to be struck between the general interests of the community and the individual's fundamental rights under the Convention. This in turn requires a 'reasonable relationship of proportionality between the means employed and the aim sought to be achieved.'[41] This test of proportionality was at the centre of the Court's evaluation of the case. In particular, it noted that 'in order to be considered proportionate, the interference should correspond to the gravity of the infringement.'[42] In this context, the Court emphasised that:

> [I] n today's society the protection of the environment is an increasingly important consideration. The environment is a cause whose defence arouses the constant and sustained interest of the public, and consequently the public authorities. Financial imperatives should not be afforded priority over environmental protection considerations, in particular when the State has legislated in that regard. The public authorities therefore assume a responsibility which should in practice result in their intervention at the appropriate time in order to ensure that the statutory provisions enacted with the purpose of protecting the environment are not entirely ineffective.[43]

The Court also underlined that states have a wide margin of appreciation concerning measures taken for the protection of the environment.[44] On the facts of the case, the Court thus found that Romania was justified in its interference with the property of the applicant. The Court was of the view that the applicant should have suspended its activity until it had obtained permits or else it should have asked for further advice from the government on what to do. It also noted that the penalties imposed by the state had been calculated to reflect the profits earned during the time in which the facility had operated without a permit and they could therefore not be considered as excessive or unrelated to the severity of the crime. The application was thus dismissed.

This case clearly sets a high threshold for a violation to be found on the basis of Article 1 of Protocol 1. Nevertheless, the outcome of such claims will to a large extent depend on the facts of the case. In *Barcza and others v Hungary*,[45] the applicant's property had been affected by the establishment of a water preservation zone. Owners of such property were precluded from using their property in any way that could endanger the quality of the water or otherwise cause pollution. Affected owners were entitled to apply for the state to purchase their property if they were unable to use their land in the way that they wished. The applicants in this case had requested that their land was expropriated, but

---

[41] [61].
[42] [64].
[43] [64].
[44] [65].
[45] *Barcza and others v Hungary,* European Court of Human Rights (ECHR), Fourth Section, App no 50811/10, (11 October 2016).

the authorities had taken no action for a number of years. The Court again stressed that a state enjoys a wide margin of appreciation in such matters, but it took the view that the delayed reaction of the local authorities, amounting to several years, was sufficient to amount to a violation of Article 1 of Protocol 1, as 'the applicants were left in a state of uncertainty as to the fate of their plot of land over a long period of time during which they could neither realistically expect to sell their property at a fair price, nor obtain expropriation against compensation.'[46] The state was therefore ordered to pay compensation.

[46] [48].